Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

MEREDITH ODEN,

Petitioner,

v.

NORTHERN MARIANAS COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's judgment should be vacated due to the participation of a non-Art. III judge?

Petitioner, Meredith Oden (Oden) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 22, 2002.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 284 F.3d 1058. The opinion of the District Court was entered October 22, 1999 and not reported.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered March 22, 2002. Jurisdiction is conferred on this court to review the judgment in question on a writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III, § 1

> The Judges . . . of the . . . inferior Courts, shall hold their Offices during good Behavior. . . .

U.S. Const. art. III, § 3, cl. 2

> The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory . . .

28 U.S.C. § 43(b)

> Each court of appeals shall consist of . . . circuit judges. . . .

28 U.S.C. § 44(b)

Circuit judges shall hold office during good behavior.

28 U.S.C. § 132(a)

There shall be in each judicial district a district court . . .

28 U.S.C. § 132(b)

Each district court shall consist of the district judge . . . for the district. . . .

28 U.S.C. § 133

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

28 U.S.C. § 134(a)

The district judges shall hold office during good behavior.

28 U.S.C. § 292(a)

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

48 U.S.C. § 1424(a)

The judicial authority of Guam shall be vested in a court of record established by Congress . . .

48 U.S.C. § 1424(b)

The District Court of Guam shall have the jurisdiction of a district court of the United States.

48 U.S.C. § 1424b(a)

The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court of Guam . . . for a term of ten years . . .

THE CASE

Oden filed her action against the Northern Marianas College alleging violations of Title IX (20 U.S.C. § 1681). Jurisdiction lay in the District Court under federal question jurisdiction (28 U.S.C. § 1331). Oden's claims were dismissed in a summary judgment proceeding on April 29, 1999 by the District Court. Oden appealed to the United States Court of Appeals for the Ninth Circuit. The summary judgment was affirmed.

The panel which heard and determined the appeal consisted of two circuit judges and the "Chief District Judge for the District of Guam, sitting by designation."

REASON FOR GRANTING THE WRIT

Article II, Section 1 of the U.S. Constitution provides in part that "[T]he judges . . . of the inferior courts, shall hold their offices during good behavior . . ." Each court of appeals ". . . consist[s] of . . . circuit judges . . ." (28 U.S.C. § 43(b)). "Circuit judges shall hold office during good behavior." (28 U.S.C. § 44(b)). "The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires." (28 U.S.C. § 292(a)). There are statutes which authorize the designation and assignment of other Article III judges. *See* 28 U.S.C. § 252 ("Judges of the Court of International Trade shall hold office during good behavior"). The judge of the District Court of Guam is not an Article III judge. He does not hold office during good behavior but rather hold office "for a term of ten years". 48 U.S.C. § 1424b(a). He presides over a territorial court. Vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a "District Court of the United States". *Mookini v. United States*, 303 U.S. 201, 205 (1938). The District Court of Guam was created under Article IV, § 3 of the Constitution, not Article III. *Guam v. Olson*, 431 U.S. 195, 196 n.1 (1977).

"Each district court . . . consist[s] of the district judge . . . for the [judicial] district . . ." (28 U.S.C. § 132(b)). Judicial districts are listed under 28 U.S.C. § 133(a). Guam is not so listed.

The Ninth Circuit panel hearing Oden's appeal was not properly constituted. *See Ryder v. United States*, 515 U.S. 177, 188 (1995) determining the Court of Military Appeals erred in according defacto validity to actions of civilian judges of the Coast Guard Court of Military Review. *See* also *Gliden Company v. Zdanok*, 370 U.S. 530 (1962).

This court has previously addressed the issue of review by Article III courts holding that "we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Article III courts, including this court, of decisions of territorial courts in cases that may turn on questions of federal law." *Guam v. Olson*, 431 U.S. 195, 201 (1977).

CONCLUSION

The Ninth Circuit panel hearing Oden's appeal was not properly constituted having not been entirely composed of Article III judges. Oden requests that this court exercise its supervisory powers by granting this petition.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 22, 2002 AND RECEIVED MARCH 30, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-16594

D.C. No. CV-98-00020-ARM

MEREDITH ODEN,

Plaintiff-Appellant,

v.

NORTHERN MARIANAS COLLEGE; AGNES MCPHETRES; JOHN DOES, I-V; BRUNO DALLA POZZA; BOARD OF REGENTS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mariana Islands
Alex R. Munson, Chief Judge, Presiding

OPINION

Argued and Submitted
February 14, 2002 — Saipan, Northern Mariana Islands

Filed March 22, 2002

Appendix A

Before: Mary M. Schroeder, Chief Judge,
Alfred T. Goodwin, Circuit Judge, and John S. Unpingco,*
District Judge.

Opinion by Judge Goodwin

* * *

OPINION

GOODWIN, Circuit Judge:

Meredith Oden appeals the district court's grant of summary judgement in favor of Northern Marianas College. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In January, 1996, Meredith Oden enrolled in a music course at Northern Marianas College ["NMC"] taught by Bruno Dalla Pozza, a teacher at NMC and a friend of Oden's father. Shortly after beginning the course, Dalla Pozza began touching Oden in ways that made her feel uncomfortable. Over the course of the next two months, Dalla Pozza's treatment of Oden grew increasingly inappropriate, ranging from comments about Oden's physical appearance to "forcibly kissing [Oden] on the mouth, inserting his tongue in her mouth, and grabbing and touching her body." In late February Oden contacted a NMC counselor and described to the counselor Dalla Pozza's behavior. The counselor assisted

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* The Honorable John S. Unpingco, Chief District Judge for the District of Guam, sitting by designation.

Oden in preparing a complaint charging Dalla Pozza with sexual harassment. Oden filed the complaint with NMC on March 8, 1996. Oden also informed Dalla Pozza that she was dropping his course. While the disciplinary matter was pending, Dalla Pozza allegedly harassed Oden on two additional occasions, the first of which was on April 10, 1996.

Upon receipt of Oden's complaint, Agnes McPhetres, the President of NMC, assigned two school counselors to assist Oden in presenting her case before the NMC Committee on Sexual Harassment [the "Committee"]. In addition to assisting Oden in documenting Dalla Pozza's harassment, the NMC counselors also provided Oden with counseling sessions. NMC's Director of Human Resources met with Dalla Pozza to discuss Oden's allegations, specifically informing Dalla Pozza that "he was not to attempt to contact Ms. Oden or her father by any means and that any attempts to do so could lead to disciplinary action against him by the NMC." Dalla Pozza denied all charges against him.

On February 19, 1997, the Committee issued a written memorandum addressed to McPhetres stating that the Committee "unanimously [agrees] that the respondent, Mr. Bruno Dalla Pozza, is guilty of sexual harassment towards the complainant, Ms. Meredith Oden." Although the Committee did not find that Dalla Pozza's conduct was serious enough to warrant dismissal from employment, the Committee did find that Dalla Pozza's conduct was serious enough to warrant disciplinary action. On February 25, 1997, McPhetres issued a letter to Dalla Pozza in which McPhetres agreed with the Committee's recommendation and imposed a number of disciplinary sanctions upon Dalla Pozza.

Appendix A

In April 1998, Oden sued Dalla Pozza, NMC, NMC's President, NMC's Board of Directors, and the United States Secretary of Education. Oden's second amended complaint alleged five causes of action.[1] The only cause of action at issue on appeal is a Title IX sexual harassment claim, made against NMC as an entity, for failure to control or discipline Dalla Pozza.[2]

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1. Oden's first cause of action was a Title IX claim brought against NMC as an entity.

Her second and third causes of action, which each had two counts, were brought against NMC, McPhetres in her individual and official capacity, and the members of the Board of Regents in their individual and official capacities. The first count was a 42 U.S.C. § 1983 claim seeking damages for failure to train, discipline and control Dalla Pozza, based upon a violation of 20 U.S.C. § 1681 and the Fifth and Fourteenth Amendments to the United States Constitution. The second count alleged the same claim based upon common law negligence.

The fourth cause of action went to trial against Dalla Pozza, and resulted in a verdict for plaintiff.

The fifth cause of action, against the Secretary of Education, was dismissed by the district court for failure to state a claim.

2. Oden's Opening Brief concerns itself solely with Title IX, and asks only that this Court determine whether NMC responded with "deliberate indifference" to her allegations of sexual harassment. Because Oden does not raise any other issues in her Opening Brief, we deem them waived. *See Milne v. Hillblom*, 165 F.3d 733, 737 n.6 (9th Cir. 1999) (declining to consider issues not raised in appellant's opening brief); *Entm't Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (same).

In addressing Oden's Title IX claim, the district court held that the local jurisdiction's two year statute of limitations period, codified at Title 7 N. Mar. I. Code § 2503(d), had expired on April 9, 1998. Accordingly, the court found that the two alleged incidents of harassment occurring after April 9, 1996 (the earliest of which occurred on April 10, 1996) were the only incidents of harassment that remained actionable. With respect to these two incidents, the court held that Oden failed to demonstrate that NMC was "deliberately indifferent" to Oden's complaint, *see Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290 (1998) (holding that Title IX's implied private right of action will not lie in absence of school district's "deliberate indifference" to teacher's conduct upon actual receipt of notice thereof), and concluded that NMC was entitled to judgment as a matter of law.

Ultimately, all defendants save Dalla Pozza were removed by summary judgment,[3] and Oden went to trial against Dalla Pozza. The jury found that Dalla Pozza had sexually harassed Oden, and awarded Oden $10,000 in compensatory damages

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3. With respect to the § 1983 claims brought against the defendants in their official capacities, the district court found that NMC is an arm of the state, and therefore held that the defendants did not qualify as "persons" within the meaning of § 1983. *See Magana v. CNMI,* 107 F.3d 1436, 1443 (9th Cir. 1997). As for the § 1983 claims brought against the defendants in their individual capacities, the district court held that the defendants enjoyed qualified immunity under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Accordingly, the court granted summary judgment to the institutional defendants on the § 1983 claims. Because it had dismissed all of the federal claims against the institutional defendants, the district court declined to exercise supplemental jurisdiction over Oden's common law negligence claims. *See* 28 U.S.C. § 1367(c).

and $30,000 in punitive damages. Dalla Pozza has not appealed, and the fact of the harassment is no longer in controversy. The only issue on appeal is whether the district court erred in granting summary judgment to NMC on the Title IX claim.

DISCUSSION

"We review de novo a grant of summary judgment." *Clicks Billiards Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Oden contends that the district court erred in granting summary judgment to NMC on her Title IX claim because, under *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998), NMC was "deliberately indifferent" to her plight. In an attempt to demonstrate "deliberate indifference," Oden expresses her dissatisfaction with NMC's handling of her allegations. She complains that the Committee's hearing did not take place until almost one year from the date that she reported Dalla Pozza's behavior to NMC. Oden also contends that this one year delay violated NMC's own administrative procedures. Further, Oden suggests that NMC insufficiently punished Dalla Pozza because NMC allowed Dalla Pozza to continue teaching at NMC.

Although Oden may be dissatisfied with NMC's approach to dealing with her allegations, her dissatisfaction alone does not render NMC liable for Dalla Pozza's conduct.

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Title IX charges a plaintiff with demonstrating that an official (1) had actual knowledge of the alleged discrimination, and (2) *responded to that knowledge with deliberate indifference.*[4] *Gebser*, 524 U.S. at 290 (emphasis added); *see also Reese v. Jefferson School District No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000).

The material facts are not in dispute. Upon receiving actual knowledge of the alleged sexual harassment, NMC took action by (1) providing NMC counselors to assist Oden in documenting and presenting her case before the Committee; (2) providing Oden with one-on-one counseling sessions; (3) instructing Dalla Pozza to avoid contact with Oden; (4) conducting a hearing; (5) concluding that Dalla Pozza had sexually harassed Oden; and (6) imposing a number of disciplinary sanctions upon Dalla Pozza. Far from demonstrating "deliberate indifference," these facts demonstrate that NMC actively engaged in investigating and resolving Oden's allegations.

Oden's strongest contention, i.e., that the delay between the date of her initial complaint, March 8, 1996, and the date of her hearing, January 3, 1997, constitutes "deliberate indifference" to sexual harassment in violation of Title IX, belies the record. Although there was a lengthy delay, there were also valid reasons for the delay: NMC had a number of administrative hurdles to jump, including the formation of a sexual harassment hearing committee; Oden had difficulty

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4. Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

retaining an attorney; and Oden had relocated to the State of New Mexico. At most, NMC is guilty of bureaucratic sluggishness. We decline to equate bureaucratic sluggishness with "deliberate indifference," especially where the school authorities began turning their bureaucratic wheels immediately after being notified of the alleged misconduct.

Viewing the facts of this case in the light most favorable to Oden, we conclude that, as a matter of law, Oden fails to show that NMC was "deliberately indifferent" to her allegations of sexual harassment. Accordingly, we affirm the district court's entry of summary judgment in favor of NMC.[5]

AFFIRMED.

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5. The district court based its decision, in part, on the Northern Mariana Islands' two year statute of limitations. *See* Title 7 N. Mar. I. Code § 2503(d). We need not do so because, even if the statute of limitations was inapplicable, thereby making the entirety of Dalla Pozza's conduct actionable, Oden would still fail to show that NMC was "deliberately indifferent" to her allegations of sexual harassment. *See Smoot v. Boise Cascade Corp.*, 942 F.2d 1408, 1411 (9th Cir. 1991) (providing that court of appeals "may affirm on any ground adequately supported by the record").

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS GRANTING DEFENDANTS NMC, BOARD OF REGENTS, AND McPHETRES' MOTION FOR SUMMARY JUDGMENT AND DISMISSING SUPPLEMENTAL COMMON LAW CLAIMS WITHOUT PREJUDICE DATED AND FILED OCTOBER 29, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

Civil Action No. 98-0020

MEREDITH ODEN,

Plaintiff

v.

NORTHERN MARIANAS COLLEGE; AGNES MCPHETRES, its President; RICHARD RILEY, U.S. Secretary of Education; JOHN DOES 1 through 5, being its Board of Regents; and, BRUNO DALLA POZZA,

Defendants

ORDER GRANTING DEFENDANTS NMC, BOARD OF REGENTS, AND McPHETRES' MOTION FOR SUMMARY JUDGMENT and DISMISSING SUPPLEMENTAL COMMON LAW CLAIMS WITHOUT PREJUDICE

Appendix B

THIS MATTER came before the court on Thursday, October 28, 1999, for hearing of the motion of defendant Northern Marianas College ("NMC"), NMC President McPhetres, and the Board of Regents' motion to dismiss, for judgment on the pleadings, or for summary judgment, or, in the alternative, to strike portions of the complaint. Plaintiff appeared by and through her attorney, Douglas F. Cushnie; Assistant Attorney General Sean Frink appeared on behalf of the movants.

THE COURT, having considered the written and oral arguments of counsel, rules as follows:

The second amended complaint contains five causes of action, some of which contain more than one count. This motion[1] concerns only the first three causes of action.[2]

The first cause of action is a Title IX sexual harassment claim made against defendant NMC for failure to adequately control defendant Dalla Pozza.

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1. This amended motion (amended August 27, 1999, but still relying upon defendants' July 8, 1999, memorandum and other filings to support the motion) is directed to plaintiff's second amended complaint, filed August 14, 1998. The intervening year was used by the parties to conduct discovery.

2. The fourth cause of action has four counts, all against defendant Dalla Pozza, and are not involved in this motion. The fifth cause of action is against the U.S. Secretary of Education, but it was dismissed by an order issued in October, 1998, after the second amended complaint had been filed.

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The second cause of action has two counts, both of which are directed to the College itself and to all members of the Board of Regents, plus President McPhetres, in their individual capacities. The first count of the second claim is a 42 U.S.C. § 1983 claim for failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments to the United States Constitution. The second count of the second cause of action alleges the same facts, but as the bases for a common law negligence claim.

The third cause of action also has two counts, against NMC, President McPhetres in her official capacity, and the Board of Regents and its members in their official capacities. The first count is also for violation of 42 U.S.C. § 1983, based on violation of the same three provisions cited in the preceding paragraph. The second count is another claim for common law negligence.

First Cause of Action — Title IX Against NMC for Failure to Control

This Title IX[3] sex discrimination (20 U.S.C. § 1681) cause of action is against NMC as an entity. After the court's previous order which ruled favorably on defendants' statute of limitations defense, only incidents occurring after April 9,

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3. Title IX provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]

1996, remain actionable. The second amended complaint refers to the "bathroom incident" (where defendant Dalla Pozza allegedly "cornered" plaintiff on April 10, 1996) and, sometime after the "bathroom incident" but before January 4, 1997 (the date of defendant Dalla Pozza's administrative hearing), "Dalla Pozza made threatening and offensive gestures to Plaintiff while on the NMC campus which caused Plaintiff to be fearful for her safety." (¶ 12, Second Amended Complaint).

Because of the dearth of case law involving Title IX lawsuits, courts use Title VII sexual harassment cases when analyzing Title IX cases. *See e.g. Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311 (10th Cir. 1987) (courts should turn to case law concerning employment-related sex discrimination under Title VII for guidance if confronted with employment-related allegation of discrimination under Title IX).

The answer here is mandated by the case law:

> Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, 20 U.S.C. § 1682, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An "appropriate person" under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently,

in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised on a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.

* * *

The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983. Until Congress speaks directly on the subject, however, we will not hold

a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.

Gebser v. Lago Vista Indep. School District, 118 S.Ct. 1989, 1999-2000 (1998).

Here plaintiff made a complaint, defendant NMC held a hearing, and defendant Dalla Pozza was disciplined. While one might argue that the complaint was not acted upon with sufficient promptness, or that the discipline meted out was too meager, that is not the standard. The standard is "deliberate indifference" to *discrimination and, as a matter of law, plaintiff cannot show that.* For that reason, there being no genuine issue as to any material fact, defendants are entitled to judgment as a matter of law on the first claim for relief.

Third Cause of Action — Count I

Against NMC, President McPhetres in her official capacity, and the Board of Regents and its members in their official capacities. Count I is for violation of § 1983, based on violation of failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments.

In its order of July 28, 1998, the court addressed the issue of the potential liability of the individual defendants in their official capacities:

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The parties are in agreement that, if Northern Marianas College is deemed an "arm of the state," all § 1983 claims against the individual defendants in their official capacities must be dismissed, as per *Magana v. CNMI*, 107 F.3d 1436, 1443 (9th Cir. 1997) and earlier cases.[4] As defendants

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4. It is settled law that the Commonwealth of the Northern Mariana Islands, ("CNMI"), its governmental entities, and officials sued in their official capacities are not "persons" within the meaning of § 1983 and cannot be held liable under the statute. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 191-192 (1990); *DeNieva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *Magana v. CNMI*, 107 F.3d 1436, 1447 (9th Cir. 1997). There is but one exception to the general rule that the CNMI, its governmental entities, and officials sued in their individual capacities are not "persons" within the meaning of 42 U.S.C. §1983: An official of a state or territory, when sued for prospective injunctive relief in his or her official capacity, is considered a "person" for § 1983 purposes. *Guam Soc. of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir.), *cert. denied*, 506 U.S. 1011 (1992); *see also Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 774-776 (9th Cir. 1995), reversed on other grounds, Regents of the University of California *v.* Doe, __ U.S. __, 117 S.Ct. 900, 904 (1997) (holding that state official is "person" within the meaning of § 1983 in suit seeking prospective injunctive relief). This is because "official-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). Thus, in addition to barring a § 1983 claim for money damages against the CNMI, the law also does not allow the maintenance of a § 1983 action against the CNMI, as an entity, for prospective injunctive relief. It follows then, that a claim for prospective injunctive relief against a governmental entity that is considered an 'arm of the State' also will not lie. Doe, 65 F.3d at 774-776; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989).

note, this defect cannot be cured by amendment and, accordingly, any claim for relief alleged on this ground must be dismissed with prejudice.

However, plaintiff claims NMC is autonomous from the Commonwealth government and that neither it nor its employees acting in their official capacities are entitled to any form of sovereign immunity. Because the record before the court has not yet been fully developed, the court declines to issue a final ruling on this aspect of government defendants' motion at this time. However, from the materials currently on file and available to the court, it appears that Northern Marianas College is indeed an "arm of the state" and would thus be accorded sovereign immunity. The court reaches this tentative conclusion based upon a traditional "arm of the state" analysis: 1) whether a money judgment against the College would be satisfied out of Commonwealth funds, 2) whether the College performs central government functions, 3) whether the College may sue or be sued, 4) whether the College has the power to take property in its own name or only in the name of the Commonwealth, and 5) the corporate status of the College. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1998), *cert. denied*, 490 U.S. 1081, 109 S.Ct. 2102 (1989); *Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 774-776 (9th Cir. 1995), reversed on other grounds, *Regents of the University of California v. Doe*, __ U.S. __, 117 S.Ct. 900, 904 (1997). Of these factors,

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"[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state." *Id.* 65 F.3d at 774.

The Commonwealth Constitution, Art XV, section 2, provides:

> *Higher and Continuing Education*:
> a) The legislature shall establish by law a Northern Marianas College that shall be headed by a president. The president of the college shall be appointed by a representative board of regents. The board of regents shall be appointed to staggered terms by the governor and shall have autonomy in the administration of its affairs and shall formulate policy [.]

The Northern Mariana Islands Code addresses the status, duties, and powers of Northern Marianas College in several sections:

> 3 N.Mar.I. Code § 1304. "*Northern Marianas College.* (a) There is *in the Commonwealth government* a Northern Marianas College to be headed by a president of the college appointed by the Board of Regents. (b) The Northern Marianas College is established as a nonprofit public corporation under the general control and direction of a board designated as the Board of Regents of Northern Marianas College which is

hereby created, and it shall enjoy all powers conferred by law upon a public corporation.* * * " (emphasis added)

3 N.Mar.I. Code § 1316. "*Board of Regents*: *Duties of the Board.* The board has the following duties:

* * *

(g) To acquire . . . any property.

* * *

(j) To act as the state board of higher education for the Commonwealth for purposes of federal law.

* * *

(l) *In consultation with the Governor, to approve the budget of the college and to have the budget submitted to the legislature pursuant to 1 CMC [N.Mar.I Code] § 7206.* (emphasis added)

* * *

(s) To enter into and perform such contracts . . . or other transactions as may be necessary in the conduct of its business[.]"

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> 3 N.Mar.I. Code § 1331. "*Northern Marianas College: Appropriation. Aside from such additional sums as may be appropriated* annually by the legislature for its financial support, the college shall be guaranteed an annual budget of not less than $6,000,000 or one percent of the general revenues of the Commonwealth, whichever is greater[.]" (emphasis added)

On balance, the court tentatively concludes that NMC is a part of the Commonwealth government. Its limited measures of autonomy do not appear to outweigh its acknowledged place "in the Commonwealth government." 3 N.Mar.I. Code § 1304. Also militating against a finding that the College exists wholly separate from the Commonwealth government is the fact that it is often represented in its legal affairs by the Commonwealth Attorney General's Office.

As indicated earlier, the information presently before the court is insufficient to rule definitively at this time. Plaintiff and defendants will be allowed an opportunity to brief and argue this issue, if the claim is included in the amended complaint, when discovery has been concluded.

It is now many months later, and plaintiff has presented nothing new, despite the court's invitation and despite the intervening discovery; rather, she continues to make the same

arguments now that she made before. A ruling on the question of whether or not NMC is an "arm of the state" is now appropriate and the court hereby adopts as its final ruling the tentative ruling made in the July 28, 1998, order: defendant NMC is an "arm" of the Commonwealth government and thus these individual defendants cannot be sued in their official capacities. Accordingly, their motion for summary judgment is granted.

Second Cause of Action — Count I

42 U.S.C. § 1983 Action Against College itself, All members of the Board of Regents, plus President McPhetres, in their individual capacities — Failure to train, discipline, and control Dalla Pozza, based upon a violation of Title 20 U.S.C. § 1681, and the Fifth and Fourteenth Amendments.

A § 1983 claim seeking to impose liability on defendants as individuals must overcome their claim of qualified immunity. Based on the analysis in the foregoing section, the court sees no reasonable chance that plaintiff could surmount the relevant standard: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). It was not until the *Gebser* decision last year that the "deliberate indifference" standard of conduct for defendants was set by the Supreme Court. Based on the court's conclusion above that defendants here did not violate the *Gebser* standard, it follows that

defendants have qualified immunity from suit, and summary judgment is hereby entered in their favor.

Common Law Negligence Claims

"The district courts may decline to exercise supplemental jurisdiction over a claim . . . if — (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). All federal claims having been dismissed, the court exercises its discretion to dismiss without prejudice the supplemental common law claims for negligence.

IT IS SO ORDERED.

DATED this 29th day of October 1999.

s/ Alex R. Munson
ALEX R. MUNSON
Judge

Supreme Court, U.S.
FILED
OCT 28 2002
CLERK

No. 01-1865

In The

Supreme Court of the United States

MEREDITH ODEN,

Petitioner,

v.

NORTHERN MARIANAS COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' unanimous decision affirming the district court should be set aside because one member of the panel was not an Article III judge.

JURISDICTION

The court of appeals entered its judgment on March 22, 2002. Petitioner did not file a petition for rehearing. The petition for a writ of certiorari was filed June 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the statement of facts in the opinion below, 284 F.3d 1058, 1059-1060, reproduced in Pet. App. 2a-6a.

REASONS FOR DENYING THE WRIT

Petitioner urges the Court to grant the writ based upon her contention that "[t]he Ninth Circuit panel hearing Oden's appeal was not properly constituted, having not been entirely composed of Article III judges." Cert. Pet. at 5. The Court should deny certiorari for the following reasons.

1. In her petition for certiorari, petitioner challenges the composition of the panel for the first time. Petitioner failed to object to the presence of a single non-Article III judge on her panel before, during, or after oral argument in the court of appeals. Petitioner never requested a rehearing or a rehearing en banc. The Court ordinarily "[does] not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511, 514 (2001). *See also Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide

questions neither raised nor resolved below"); *TRW Inc. v. Andrews*, 122 S.Ct. 441, 451 (2001) ("We do not reach this issue because it was not raised or briefed below").

2. Failure to object to the make-up of the panel before the court of appeals constitutes a waiver of any right to a panel composed of three Article III judges. *Cf. Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 848 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver"). *See also Belom v. National Futures Association,* 284 F.3d 795, 799 (7th Cir. 2002) (relying on *Commodity Futures Trading Commission*, 478 U.S. at 848) ("The right to an Article III forum is not absolute and may be waived"); *United States v. Desir*, 273 F.3d 39, 44 (1st Cir. 2001) (Defendant's failure to object to magistrate's presiding over voir dire waives constitutional entitlement to an Article III judge at jury impanelment).

3. Petitioner has not identified any conflict among the circuits on the question presented, nor is respondent aware of any. Petitioner cannot argue with confidence that another court would reach a different result given the same circumstances.

4. Assuming petitioner's claim has not been waived, the decision below was consistent with the decisions rendered by this Court.

Initially, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), Article III does not apply in the territories. *Id.* at 544 (relying on *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828) (Marshall, C.J.). *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (Only "fundamental" constitutional rights, such as those embodied in the Fifth and Sixth Amendments, are guaranteed to

inhabitants of the territories); *Reid v. Covert*, 354 U.S. 1, 13 (1957) (Although "fundamental" constitutional rights apply everywhere, the Court determined in the Insular Cases that certain constitutional safeguards were not applicable to the territories). Therefore, "in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies." *Glidden Co.*, 370 U.S. at 545.

Furthermore, it is well settled "that where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public." *McDowell v. United States*, 159 U.S. 596, 602 (1895). *See also Ryder v. United States,* 515 U.S. 177, 180 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under color of official title even though it is later discovered that the legality of that person's appointment . . . to office is deficient"). At the very least, the non-Article III judge participating on the panel was acting in a *de facto* capacity. Accordingly, the decision rendered by the court of appeals is valid.

Finally, honoring the court of appeals' decision is consistent with this Court's long-standing precedent of tolerating decisions from lower courts that are less than letter-perfect. In *Keene v. McDonough*, 33 U.S. 308, 310 (1834), the Court considered a challenge to the adjudication of a Spanish tribunal made after the cession of the country to the United States. Because it had jurisdiction of the case and rendered its decision while the country was, de facto, in the possession of Spain and subject to Spanish

laws, the decision of the Spanish tribunal was valid. *Id.* Furthermore, when the Court of Appeals for the Second Circuit was composed of one Supreme Court justice and one district court judge, the death of the Supreme Court justice did not deprive the surviving district court judge from sitting alone as the circuit court. *Pollard v. Dwight*, 8 U.S. 421, 429 (1808) (Marshall, C.J.). The circuit consisted of two judges, any one of whom was capable of performing judicial duties. *Id.* More recently, the Court held that while judges sitting on the Court of Claims and the Court of Customs and Patent Appeals have specialized functions, this does not deprive them of the capacity to sit in judgment upon the staple business of the District Courts and Courts of Appeals. *Glidden Company v. Zdanok*, 370 U.S. 530, 584 (1962).

Although the challenged panel member was not an Article III judge, his court exercises the same jurisdiction as a United States District Court. *See* 48 U.S.C. § 1424(b). *See also Schenck v. Government of Guam,* 609 F.2d 387, 390 (9th Cir. 1979) (Guam's District Court has original and exclusive jurisdiction of all cases arising under the constitution, treaties and laws of the United States.) In addition, petitioner's appeal was heard and decided by two eminently qualified Article III judges. Chief Judge Schroeder has sat on the court of appeals since 1979. Senior Judge Goodwin was appointed to the Ninth Circuit in 1971. Both agreed that the lower court properly granted summary judgment to respondent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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